

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Price Cap Performance Review)	CC Docket No. 94-1
for Local Exchange Carriers)	
)	
Access Charge Reform)	CC Docket No. 96-262

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**CITIZENS UTILITIES COMPANY'S REPLY TO
OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION**

Citizens Utilities Company, on behalf of itself and its incumbent local exchange telecommunications subsidiaries (hereinafter referred to, collectively, as the "Citizens LECs"), by its attorney, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405 (the "Act"), and Section 1.429 of the Commission's Rules, hereby replies to the oppositions filed by AT&T and MCI¹ to the Citizens LECs' petition for reconsideration of the Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262 (hereinafter referred to as the "*Price Cap Order*"),² and shows as follows:

I. AT&T's Procedural Issues

It is perhaps telling that AT&T buried its contentions regarding three procedural issues in a footnote to its opposition. In footnote 2 to that opposition, AT&T contends that the Citizens LECs

¹ The Citizens LECs are not certain that MCI did, in fact, file an opposition to the petition for reconsideration. MCI did file an opposition to a companion rule waiver request filed by the Citizens LECs, but indicated CC Docket No. 94-1 in the pleading's caption.

² In the Matter of Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, CC Docket Nos. 94-1 and 96-262, FCC 97-159, rel. May 21, 1997.

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made no submission in response to the Commission's request for comments in CC Docket No. 94-1; that the petition, including attachments, exceeded the Commission's Rule Section 1.429(d) page limits; and that the "petition relies, in part, on facts which occurred prior to its last opportunity for filing in this proceeding or which could have been known to petitioner prior to such opportunity [citing Section 1.429(b) of the Commission's Rules]." Rather than attempting meaningful rebuttal to the evidence contained in the two declarations to the Citizens LECs' petition, AT&T contends that the evidence is "outside of the scope of a reconsideration petition" and need not be analyzed in any detail. A correct reading of the applicable rules shows that AT&T's procedural arguments are incorrect. Unlike the detailed evidence presented by the Citizens LECs to demonstrate the adverse impact of application of an inappropriate 6.5% productivity factor upon rural price cap LECs,³ AT&T's procedural points merit little consideration.

As to AT&T's first procedural point, as pointed out at page 2 of the Citizens LECs' petition,

First, Citizens Utilities Company, on behalf of the Citizens LECs and all of its other telecommunications subsidiaries, is a party in the CC Docket No. 96-262 proceeding (the "Access Reform Proceeding").⁴ The Citizens LECs, whose price cap election became effective on July 1, 1996, filed no pleadings in the stages of the CC Docket No. 94-1 proceeding that preceded the *Access Reform Notice*.⁵ The *Access Reform Notice* and the *Price Cap Order* had the effect of consolidating the CC Dockets No. 94-1 and 96-262 proceedings. Accordingly, the Citizens

³ AT&T, in footnote 1 to its opposition, restates the obvious -- that the Citizens LECs are the sole rural LEC enterprise under price cap regulation. This fact is a reflection on the price cap regulatory regime rather than a demonstration, as AT&T would have it, that the Citizens LEC petition is self-serving. The reality is that an regulatory regime that was already unattractive to rural LECs before the *Price Cap Order* was probably rendered unthinkable for such carriers by imposition of the inappropriate 6.5% productivity factor.

⁴ See Access Charge Reform, Notice of Proposed Rulemaking, CC Docket No. 96-262, Price Cap Performance Review for Local Exchange Carriers, Third Report and Order, CC Docket No. 94-1, FCC 96-488 (rel. Dec. 24, 1996) (the "*Access Reform Notice*").

⁵ It should be noted that the Price Cap Performance Review for Local Exchange Carriers, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 94-1, 10 FCC Rcd 13659 (1995) (the "*Fourth Further NPRM*"), was the request for comments most immediately preceding the *Access Reform Notice*. It was released on September 27, 1995, almost one year before the Citizens LECs became price cap regulated.

Utilities' comments filed in response to the *Access Reform Notice* must be deemed to be part of the record in the CC Docket No. 94-1 proceeding.

Notably, AT&T did not disagree with the foregoing statement.

AT&T's page limit issue is easily dismissed. Affidavits and summaries that factually support a pleading are not counted in determining the length of pleadings. *See* Section 1.48(a) of the Commission's Rules. That declarations have the same status as affidavits in Commission practice is beyond argument. *See* Section 1.16 of the Commission's Rules. Accordingly, the two declarations appended to the Citizens LECs' petition do not count in the 25 page limit imposed by Section 1.429(d) of the Commission's Rules. The Citizens LECs' petition, at 20 pages in length, exclusive of the cover page, table of contents, summary and two declarations, is well within the page limitation.

Finally, AT&T did not attempt to rebut the argument in Section V of the Citizens LECs' petition that the Commission can and must exercise its discretion under Section 1.429(b)(3) of its Rules to review Citizens LEC-specific data presented with the pleading in addressing the two key issues raised: (1) that the 6.5% productivity factor is inappropriate for application to rural price cap LECs; and (2) that this productivity factor will have an adverse impact upon the Citizens LECs' continued ability to invest in rural infrastructure to meet their universal service obligations. What AT&T has done in footnote 2 to its opposition is attempt to write Section 1.429(b)(3) out of the Commission's Rules by a selective and erroneous gloss that relies exclusively upon subsections (b)(1) and (b)(2).

II. The Oppositions Serve To Buttress The Citizens LECs' Argument

The two oppositions actually assist the Citizens LECs in arguing their case against application of the 6.5% productivity factor to rural price cap LECs. Try as they might, AT&T

and MCI fail to prove, through case law or logic, that BOCs and rural price cap LECs are so alike that they should be treated under an identical productivity factor.

First, neither AT&T nor MCI attempted to address Dr. Andrews' extensive analysis and conclusions in Attachment 1 to the Citizens LECs' petition. In his declaration, Dr. Andrews dealt at great length with the several, material errors inherent in the application of a unitary productivity factor, based upon the Commission's BOC data-driven TFP analysis, upon rural price cap LECs. Dr. Andrews has clearly, convincingly and without rebuttal demonstrated that BOCs and rural LECs are so dissimilar in nature that rural LEC productivity can only be measured using rural LEC data.

Second, neither AT&T nor MCI appear to recognize that the world has fundamentally changed since introduction of price cap regulation in 1990-1991. The price cap regulatory system, through the course of its historical development, is no longer limited in application to the mandatory participants, consisting of the BOCs and GTE. The Citizens LECs elected price cap regulation in 1996 because they believed, based upon the history of that system and FCC statements in pending rulemakings leading up to a permanent system, that it was likely that a permanent system would effectively continue to recognize that not all price cap LECs are BOCs by maintaining at least two productivity factor options. Further, although never acknowledged by AT&T or MCI, the Telecommunications Act of 1996 and such FCC decisions as the *Universal Service Order* require regulatory treatment of rural telephone companies that is consistent with their unique role in universal service.

As late as the decision in *Price Cap Performance Review of Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961 (1995) (the "*Price Cap Review First Report*"), the

Commission expressed deep concern about the propriety of imposing a single productivity factor upon all price cap LECs. *See, e.g., id.* at 9027, ¶ 145 (“[W]e tentatively conclude that the long-term LEC price cap plan should have at least two options”), and *id.* at 9035, ¶ 165 (“We tentatively conclude, however, that in view of the heterogeneity of LEC performance under price caps, our plan in the future should have at least two choices”). The Citizens LECs submit that little, if any, commonality exists between BOCs and rural LECs to support the *Price Cap Order*’s imposition of the unitary 6.5% productivity upon rural price cap LECs.

At page 5 of its opposition, AT&T points out, correctly, that the FCC’s decision in *Policies and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6799-6800 (1990), made price caps mandatory only for the BOCs and GTE because of a lack of reliable data pertaining to, and diversity among, independent LECs. This recitation is correct, as far as it goes. What may have been an appropriate decision in 1990, based upon the facts, or lack of facts, is no longer appropriate seven years later, in a vastly changed industry and regulatory world. In 1997, what is required to address the heterogeneity between BOCs and rural LECs is a rural LEC-specific rulemaking in which it is determined what data is required to address the issue and then to analyze the data submitted in response. The Citizens LECs are seeking reconsideration of the *Price Cap Order* because it addressed the heterogeneity issue in an indirect, negative and, in the case of rural price cap LECs, harmful way -- by the supposed panacea of a low-end adjustment for those carriers that cannot operate under the 6.5%

productivity factor.⁶ The time has come, at least in the case of rural price cap LECs, for the heterogeneity issue to be directly addressed in rural LEC-specific price cap rulemaking.

The Citizens LECs' petition represents an urgent request for the Commission to recognize, as it must, that rural LECs are not BOCs, and that BOC economic and operating characteristics are inapposite to setting a proper productivity factor for rural price cap LECs. In light of what has developed in seven years of price cap regulation, including the decision of a rural LEC to come under that system of regulation, it is no longer appropriate for price cap regulation to be viewed as an exclusive club which LECs enter voluntarily only at their peril.

One final point requires comment. The Citizens LECs have demonstrated, without refutation, that the 6.5% productivity factor is inappropriate for rural price cap LECs, and, further, that such application will hinder the ability of the Citizens LECs to meet their universal service and other requirements in rural America. The AT&T and MCI argument in response to the Citizens LECs' petition, reduced to basics, is that all carriers that enter into price cap regulation are so similar to the BOCs that a BOC-derived productivity factor is proper in its application to BOCs, GTE and rural price cap LECs alike. The legal and practical fallacies of this proposition are -shown at great length in the Citizens LECs' petition. It is further demonstrated by the following rhetorical question: if there is no discernible difference between the urban and suburban areas preponderantly served by the BOCs and the rural communities served by the Citizens LECs, why is it that neither AT&T, MCI nor any other entity with

⁶ MCI's contention, at page 5 of its opposition, that Citizens has nothing to worry about because the "low-end adjustment formula nonetheless guarantees a 10.25% rate of return" for each year after the first that falls below that return level is not well taken. Not only does the low-end adjustment fail to remedy the fundamental flaw that the Citizens LECs address in their petition, but it "guarantees" nothing. The low-end adjustment does the same thing as a prescribed rate of return, creating the opportunity to earn at a certain level.


competitive local exchange carrier interests is entering into service in Troy, Montana, Davey, West Virginia or any of the several hundred other rural communities that are served by the Citizens LECs? The answer, of course, is that rural America is more sparsely settled and far more costly and difficult to serve than are the urban and suburban areas where competition seems to be developing. The Citizens LECs are not BOCs; the decision to impose a unitary productivity factor derived from BOC data and experience upon the Citizens LECs, as rural price cap carriers, is incorrect.

Conclusion

For the reasons set forth in the Citizens LECs' petition and in this reply, the Commission's decision to impose a 6.5% productivity factor upon rural price cap LECs must be reversed. At the earliest possible moment, the Commission should, as requested in the Citizens LECs' petition, suspend application of the 6.5% productivity factor upon rural price cap LECs, and impose an interim productivity factor during the pendency of a rural LEC-specific rulemaking to determine an appropriate, long-term factor.

Respectfully submitted,

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August 27, 1997

Certificate of Service

I, Richard M. Tettelbaum, Associate General Counsel for Citizens Utilities Company, certify that copies of the foregoing "Citizens Utilities Company's Reply to Oppositions to its Petition for Reconsideration" have been served upon the following parties by first class, U.S. Mail, postage prepaid, unless otherwise shown, this 27th day of August, 1997.



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